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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/789,545	02/27/2004	Steven W. Ek	ART 03.03	9474

7590 10/05/2009
Grossman, Tucker, Perreault & Pfleger, PLLC
55 South Commercial Street
Manchester, NH 03101

EXAMINER

COMSTOCK, DAVID C

ART UNIT	PAPER NUMBER
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3733

MAIL DATE	DELIVERY MODE
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10/05/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/789,545

Applicant(s)

EK, STEVEN W.

Examiner

DAVID COMSTOCK

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 October 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3,6,7,9 and 22-32 is/are pending in the application.
- 4a) Of the above claim(s) 22-32 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3,6,7 and 9 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 21 July 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date | 6) <input type="checkbox"/> Other: _____ |
| <u>12/7/07(x4), 3/28/08(x4), 10/1/08(x2), 3/30/09, 5/2/09, 6/8/09, 7/16/09, 8/27/09, 9/25/09</u> | |
| <u>(x2).</u> | |

DETAILED ACTION

Election/Restrictions

Applicant's confirmation of the election without traverse of invention I, claims 1-21, in the reply filed on 04 October 2007 is acknowledged. Claims 22-32 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1, 3, 6, 7 and 9 are rejected under 35 U.S.C. 102(e) as being anticipated by Ogden (US 6,299,645).

Ogden teaches an implant 400 comprising: a load bearing surface, said surface comprising a body portion comprising a recess 408 comprising an undercut 406 and an insert 500 at least partially disposed in said recess 408 and comprising a protrusion 505 at least partially received in said undercut 406; further comprising a mounting feature

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410; wherein said body portion comprises a metallic material (lines 2-3 of column 5) and said insert 500 comprises a polymeric material (lines 32-33 of column 6).

Claims 1 and 6 are rejected under 35 U.S.C. 102(e) as being anticipated by Hyde et al. (US 6,599,321).

Hyde et al. teach one embodiment of an implant comprising: an implant body portion 424' comprising at least one annular recess; and an annular insert 402B' disposed in said recess; said implant comprising a load bearing surface, said load bearing surface comprising a portion of said body portion 424' and a portion of said insert 402B'; wherein said body portion 424' comprises a metallic body. Hyde et al. also teach another embodiment of an implant comprising an implant body portion 302 comprising a plurality of recesses 306; and a plurality of inserts 18 disposed in said recesses 306.

Response to Arguments

Applicant's arguments filed 04 October 2007 have been fully considered but they are not persuasive.

The prior art comprises surfaces capable of bearing loads. Moreover, such surfaces comprise a curve. The curve can be considered to be "based on" the curvature of a patient's articular surface, at least because it is generally configured to be suitable for use in a spine and Applicant has not explicitly defined criteria by which a determination can be made as to whether the curvature can be considered to be "based

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on" the patient's articular surface. In addition, the inserts are formed of material that is inherently resilient deformable.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David Comstock whose telephone number is (571) 272-4710 (a detailed message should be left if Examiner is unavailable). If attempts to reach the Examiner by telephone or voicemail are unsuccessful, the examiner's supervisor, Eduardo Robert, can be reached at (571) 272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/David Comstock/
Examiner, Art Unit 3733

/Eduardo C. Robert/
Supervisory Patent Examiner, Art Unit 3733